

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

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Paper No. 25
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Zena Rommett and Camille Rommett Romanovich

Serial No. 75/494,451

Richard L. Huff for Zena Rommett and Camille Rommett
Romanovich.

Glenn G. Clark, Trademark Examining Attorney, Law Office
115 (Tomas V. Vlcek, Managing Attorney).

Before Hanak, Hairston and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Zena Rommett and Camille Rommett Romanovich, joint
applicants, seek registration on the Principal Register for
the mark FLOOR-BARRE for "Educational services, namely,
instruction in the ballet field,"¹ in Int. Class 41.

¹ Application Serial No. 75/494,451 was filed on June 1, 1998, based upon applicants' claim of use in commerce since at least as early as 1962. According to the application papers, the word "barre" is translated from the French as "bar." The Office granted applicants' petition to make this application "special" in light of applicants' notification to competitors of specific and repeated instances of infringement of their FLOOR-BARRE mark. Applicants also claim ownership of Reg. No. 1,698,079 for the mark ROMMETT FLOOR-BARRE TECHNIQUE for the same recited services ("educational services; namely, instruction in the

Applicants have asserted throughout that the mark they seek to register is inherently distinctive. However, in the alternative, they claim, pursuant to Section 2(f) of the Trademark Act, that the designation FLOOR-BARRE has acquired distinctiveness as a source indicator in light of Ms. Rommett's use of this term for more than forty years.

The Trademark Examining Attorney initially refused registration on the basis that the term FLOOR-BARRE was merely descriptive of the recited services, but since the second Office action has held that the term is generic for the recited services. When this refusal was made final, applicants appealed to this Board. Applicants and the Examining Attorney filed briefs, but applicants did not request an oral hearing.

It has been repeatedly stated that "determining whether a mark is generic ... involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?" H. Marvin Ginn v. International Association of Fire Chiefs, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). Of course, in a

ballet field"), in which registration Ms. Rommett disclaimed the word "TECHNIQUE" apart from the mark as shown.

proceeding such as this, the genus of services at issue are the services set forth in the recitation of services in the application itself. Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) ["Thus, a proper genericness inquiry focuses on the description of services set forth in [the application or] certificate of registration."].

Moreover, the burden rests with the Trademark Examining Attorney to establish that the mark sought to be registered is generic for the services as recited in the application. In re Merrill Lynch, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1997). It is incumbent upon the Trademark Examining Attorney to make a "substantial showing ... that the matter is in fact generic." Indeed, this substantial showing "must be based on clear evidence of generic use." Merrill Lynch, 4 USPQ2d at 1143. Thus, it is beyond dispute that "a strong showing is required when the Office seeks to establish that a term is generic." In re K-T Zoe Furniture Inc., 16 F.3d 390, 29 USPQ2d 1787, 1788 (Fed. Cir. 1994). Moreover, any doubt whatsoever on the issue of genericness must be resolved in favor of the applicants. In re Waverly Inc., 27 USPQ2d 1620, 1624 (TTAB 1993).

The record in this case is quite massive. In support of his contention that FLOOR-BARRE is generic, the Trademark Examining Attorney has made of record a large number of excerpts of articles from the LEXIS/NEXIS database² as well as printouts of Internet webpages.³ The time period for these excerpts and articles that we have considered spans from 1983 to 2000. However, most of these excerpts and articles are from the 1990's.

Some of the LEXIS/NEXIS excerpts were retrieved merely because the word "floor" immediately preceded (or was in

² The first search of LEXIS/NEXIS on September 24, 1998 garnered thirty-eight stories while a second search of LEXIS/NEXIS on April 14, 1999 found forty-six stories (of which only eight were new hits). The Trademark Examining Attorney conducted a third search of LEXIS/NEXIS during February 2000, but the Office action of February 24, 2000 added only two new stories to the record, for a total of forty-eight news stories from the LEXIS/NEXIS database, all displayed using the "kwic" format.

³ The Trademark Examining Attorney performed a number of different searches of the Internet. He retrieved 188 hits with an Alta Vista search of the term "floor barre" on September 23, 1998, of which the summaries of only the first ten were placed into the record. Of these ten summaries, the first four referred to Dance classes at the San Francisco Dance Center with Beth Abrams - a dance instructor trained and licensed by applicant, Ms. Zena Rommett.

Then the Trademark Examining Attorney performed a second Alta Vista search of the term "floor-barre" (in this search, using a hyphen) on April 14, 1999. This time he retrieved 213 hits, of which the first three hits directly referred to applicants. Nonetheless, the Trademark Examining Attorney selected random websites from beyond the first page of summary hits for inclusion in the record.

The Trademark Examining Attorney performed another Internet search during February 2000, and selected webpage printouts were attached to the Office action of February 24, 2000.

close proximity to) the word "barre." From the context of these articles, it is clear that a "barre" (bar) is a horizontal rail fixed to the wall of a dance studio. These hits demonstrate that along with mirrors, both the "floor" and "barre(s)" are critical components of a dance studio:

The studio features a raised **floor, barres** and mirrors... ⁴

... I would want to be on some kind of wood **floor.**"

The **barre**: Ballet classes traditionally start here. You want a sturdy waist high barre to hold onto for support while you work ...

[GRAPHIC: ... Jane Green leads a ballet class at the Jewish Community Center, where the studio has a wood **floor, barre** and mirror, three important things to look for ...]⁵

"While I was teaching with them, I was never happy with the facilities. There were not proper **floors, barres** and mirrors," she said. "I felt the children should have an opportunity for excellence, not only in lessons, but in the ..."⁶

... fields, with the aid of equipment ranging from a state-of-the-art voice laboratory to a performance evaluation studio complete with sprung **floor, barres** and mirrors. Group or individual counseling is available

As requested by applicants, we have not considered the additional hits placed into the record as a result of the Trademark Examining Attorney's HOT BOT search of June 2002.

⁴ St. Louis Post-Dispatch, September 17, 1998 [#1 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

⁵ The Cincinnati Enquirer, March 6, 1998 [#3 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

⁶ Baltimore Jewish Times, August 6, 1993 [#22 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

for conditions like career stress, stage fright and depression.⁷

* Exercise Classes - The aerobics room was well designed: spacious, a quality wood **floor**, "**barres**" at various levels, mats, mirrors and light exercise equipment.⁸

... equipped with a voice lab, a soundproof recording booth and a performance-evaluation unit with piano, dance **floor**, **barre** and mirrored walls. Staff includes a speech pathologist trained in opera and the orthopedic consultant to the New York City ...⁹

... a voice lab with a soundproof recording booth and a performance-evaluation unit with piano, sprung dance **floor**, **barre**, and mirrored walls. The staff, literally conversant in the arts, includes a speech pathologist trained in opera and the orthopedic ...¹⁰

... other kind of dance flooring? If it's not specifically a dance studio, is dancing allowed on those nice wood **floors**? Are there **barres**, good mirrors, piano, plenty of tables and chairs, rehearsal furniture, record player, tape recorder? ...

... drinking fountains, and two unisex bathrooms, a very comfy lounge is provided with lots of big, fluffy pillows on the carpeted **floor** and **barres** to stretch out on...

Studio 1 is fairly large ... with good mirrors, a decent enough dance **floor**, **barres**, plenty of natural light, and a formerly red-painted piano that John has

⁷ Back Stage, March 15, 1991 [#28 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

⁸ The San Francisco Chronicle, March 26, 1990 [#29 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

⁹ The San Diego Union-Tribune, January 16, 1989 [#30 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

¹⁰ Medical World News, December 12, 1988 [#31 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

restored to its original burled oak
magnificence ...¹¹

... soundproof booth, sophisticated fiber-
optic equipment to examine vocal chords and
a lab with a springwood dance **floor** and
barre. The clinic has a piano, mirrors and
a video camera to observe dancers and
musicians at work, and it offers free...¹²

... Leningrad, not the National Ballet Theatre
in Toronto, not Julliard in New York. In
terms of the space, the **floors**, **barres**,
mirrors, and lights, this is the best...¹³

In some of the LEXIS/NEXIS stories, the discussions
were not about an actual dance studio at all, but were
merely citations to *faux* affectations placed in other
architectural settings that are merely reminiscent of a
dance studio:

... Levines to add a line of dance leotards
for Martha Graham wannabes. The stores even
have a small dance **floor**, **barre** and mirror...¹⁴

... In a skylighted atrium, there are a
portable dance **floor**, **barres** and mirrors...¹⁵

...The turbines and generator that once filled
the building have given way to dance **floors**,

¹¹ Back Stage, September 18, 1987, September 19, 1986, and
September 13, 1985 (These all share the same by-line. The 1986
and 1987 articles seem to be verbatim matches, though changed
slightly from the original article of 1985.) [#32, #36 and #37 of
Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

¹² Los Angeles Times, (UPI), February 22, 1987 [#33, #34 and
35 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

¹³ The Christian Science Monitor, December 29, 1983 [#38 of
Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

¹⁴ St. Petersburg Times, January 17, 1993 [#24 of Thirty-eight
LEXIS/NEXIS stories (September 24, 1998)]

¹⁵ St. Petersburg Times, August 14, 1992 [#25 of Thirty-eight
LEXIS/NEXIS stories (September 24, 1998)]

barres, pianos and sound systems - though one generator, neatly painted in blue, does remain as a remembrance of things past.¹⁶

"... It's also about the connection between the foot and the **floor**."

The **barre** was originally meant for dance practice. Instead, photographs and paintings lean against it. "That's so they can be easily moved ..." ¹⁷

And in the category of "irrelevant hits," we note one entry that can be tied to the town of Barre, Massachusetts:

... Hanson moved slowly through the first **floor** of the **Barre** Town Hall Saturday...¹⁸

In response to the continued refusals¹⁹ to register based upon Section 2(e)(1) of the Act, applicants have been quite forthright in submitting for the Trademark Examining Attorney's inspection large amounts of literature describing applicants' FLOOR-BARRE instruction in the field of ballet.

For example, the record shows that Zena Rommett is recognized as a pioneer in dance rehabilitation and injury prevention. More than forty years ago, Ms. Rommett began to develop a system of exercises that progress from a

¹⁶ Orlando Sentinel Tribune, April 26, 1992 [#26 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

¹⁷ The New York Times, June 20, 1991 [#27 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

¹⁸ Worcester Telegraph & Gazette, November 16, 1998 [#7 of Forty-six LEXIS/NEXIS stories (April 14, 1999)]

¹⁹ The same Trademark Examining Attorney consistently refused registration in Office actions dated September 24, 1998, April

supine to a standing position. While relaxing, her methodologies produce significant results for strengthening the deep abdominal and back muscles. Often described as the "Zena Rommett Floor-Barre Technique®,"²⁰ she and her accredited students continue to provide instruction in this technique at many different universities, companies and dance studios around the United States. Training in her methods is also made possible through a number of videos available on the web.²¹ Ms. Rommett herself continues to provide instruction through "STEPS on Broadway" as well as through her own "Zena Rommett Dance Association." Her students include non-dancers seeking body conditioning and physical rehabilitation. Her instruction during a workout focuses on fine-tuning movement, managing turnout, achieving balance, control and alignment so that the dancer (or other athlete) develops beautiful lines, smooth transitions and a fluidity of movement.²²

15, 1999, February 24, 2000, August 15, 2000, May 16, 2001 and June 12, 2002.

²⁰ For example, see Reg. No. 1,698,079.

²¹ <http://www.floor-barre.org/>, "Zena Rommett: Floor-Barre Technique I," Z.R.D.A. Ltd. ©1991; and "Zena Rommett: Floor-Barre Technique II," Z.R.D.A. Ltd. ©1997.

²² Dance Magazine, December 1997; Brochure entitled "Zena Rommett Dance Association, Ltd., Founded 1968"; New York Dance Fax, June 1997; Footnotes: A Memoir by Tommy Tune; WoodstockTimes, March 6, 1997; The New York Post, "Dance moves barre none," October 25, 1995; The Village Voice, November 20, 1978; Attitude - The Dancers' Magazine, Spring 1993, and <http://www.floor-barre.org/>.

As seen from the excerpts placed into this record, dancers often warm up for a dance class with traditional ballet "barre exercises." Applicants' technique takes these same movements but has the dancer executing these barre exercises while lying on the floor. Hence, even without examining current usage, one might fairly conclude that when ballet exercises traditionally done at the barre are executed on one's back on the floor, the term "floor-barre exercises" might be found, at the very least, to be suggestive (rather than arbitrary) in origin.²³

One of the Dance Magazine articles that applicants placed into the record (also one of the articles excerpted by the Trademark Examining Attorney) begins as follows:

ZENA MOMMETT FLOOR BARRE TECHNIQUE

*ACCORDING TO A STUDY CONDUCTED BY ARIZONA STATE UNIVERSITY, INJURED DANCERS OR THOSE WITH MALADAPTIVE MOVEMENTS RELY MORE ON DANCER-ORIENTED THERAPIES THAT INVOLVE CORRECTIVE AND REHABILITATIVE SESSIONS THAN ON CONVENTIONAL PHYSICAL THERAPY. ONE OF THESE ALTERNATIVES - THE **ZENA ROMMETT FLOOR-BARRE TECHNIQUE™** - HAS BEEN RECOMMENDED BY THE MEDICAL AND DANCE PROFESSIONS FOR OVER FORTY YEARS.*

"What I do," says Zena Rommett, "is define, refine, and fine-tune movements so that they can be performed more correctly and easily. The muscles become lengthened and strengthened, and energy is not dissipated but directed. It all comes from the basics taught in a pure manner."

²³ viz., contrast this with Pilates terminology. See discussion at pp. 18 - 19, *infra*.

As impossible to describe as a dance class, Rommett's sessions descend, but are not borrowed, from one of the first **floor-barre** therapists, Russian born Boris Kniaseff (1900-75), whose innovation became known worldwide. Her method is unique and is based upon her professional dance background and experience as a teacher at Joffrey's American Ballet Center, the company's school in New York City. The founding of her own institute in 1968 led to the creation of her method, now known in Europe and Asia as well, and which is taught in several American Universities²⁴

This article about Ms. Rommett does note a prior history of floor-barre (also "Barre à terre" or "barre au sol"²⁵) therapies, specifically that of Boris Kniaseff, as do several other articles located by the Trademark

Examining Attorney:

... I first encountered the Boris Kniaseff **floor barre** as a child in Switzerland. It was then brought to Paris by Jacqueline Fynnaert... There is an admitted resemblance to the **floor barre** system, and the choreographic work of Daniel Meja...²⁶

The ultimate **floor barre** video, Marjorie Liebert's Evolution of the Barre à terre of Boris Kniaseff ...²⁷

²⁴ *Dance Magazine*, November 1997 [#8 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)] and as attached to applicants' response of March 22, 1999.

²⁵ <http://www.criticaldance.com/ubb/Forum7/HTML/000016.html>

²⁶ *Dance Magazine*, December 1997 [#7 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)], as well as <http://www.britannica.com/bcom/magazine/article/print/0,5746,25852,00.html> in the Trademark Examining Attorney later Internet search.

²⁷ *Dance Magazine*, July 1998, taken by the Examining Attorney from <http://www.britannica.com/bcom/magazine/article/print/0,5744,56379,00.html>

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Claudia Rudolf Barrett, Director (Ballet technique, pointe, variations, repertoire, kniaseff **floor barre**)...²⁸

Several other practitioners of "floor barre" in the United States seem to draw on their own advanced studies with Boris Kniaseff and his protégés in post-war Switzerland and France:

Ballet **Floor Barre**: A Warm-Up and Conditioning Program (1995). A 45-minute video by Nicole Vass.²⁹

... Bolshoi Ballet Academy in Moscow. Vail's conference and managing director, Katherine Kersten, arranged sessions in kinesiology, **floor barres**, a history of the Bolshoi Ballet School and Theater, and classes by Gilbert Mayer of the Paris Opera Ballet School...³⁰

In addition to the information gleaned from the literature reviewed above, we examine the other usages of the term "Floor-Barre" found by the Trademark Examining Attorney. As noted by applicants, these fall into several distinct categories.

This application was made special because applicants alleged that competitors were infringing this mark. One exhibit supporting this petition was a cease-and-desist

²⁸ <http://home.fuse.net/ballettech/staff.htm>

²⁹ <http://www.bigstar.com/...html> Via New Zealand-born Lucette Aldous of the Australian Ballet
<http://www.criticaldance.com/ubb/Forum7/HTML/000016.html>

³⁰ *Dance Magazine*, December 1994 [#21 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

letter dated July 14, 1998, sent from applicants' previous counsel, David S. Kashman, to Pamela Pribisco and her employer, White Cloud Studios. This was based on a covenant not to compete as well as a violation of applicants' rights in their claimed service mark. It is then of some interest that Ms. Pribisco's name surfaced several times in the searches conducted by the Trademark Examining Attorney:

In addition to technique and repertory classes, participants will also study **floor barre** with Pam Pribisco ...³¹

Karen Danzler: ... Karen also studies the Pilates technique with Jessica Fadem, **floor barre** with Pamela Pribisco ...³²

On the other end of the spectrum, applicants have consistently pointed out that some of these LEXIS/NEXIS stories (in addition to the November 1997 article from Dance Magazine quoted above), explicitly refer to Ms. Rommett, for example:

At STEPS, instructor Lonne Moretton showers his students with corrections. He asks if I have taken the **Rommett floor-barre** before and places me in the middle of the room so I'm under his constant surveillance.³³

... prize also included a round-trip flight for her and her husband, Steven, on American

³¹ <http://www.jacobspillow.org/edu.htm>

³² Http://www.isadoraduncan.org/About_Lori/Karen/karen.html

³³ The Village Voice, February 2, 1999 [#2 of Forty-six LEXIS/NEXIS stories (April 14, 1999)]

Airlines; a **Zena Rommett floor barre** class at Broadway Dance Center...³⁴

Many people - professional dancers and amateurs, teenagers and 70-year-olds - swear by his five-morning-a-week **floor barre** class at Green Street. A method he learned from New York teacher **Zena Rommett**, the **floor barre** is rooted in the traditional ballet barre exercises, but performed while lying on the floor...³⁵

STEPS on Broadway offers dance classes for all levels. Within this diverse professionally based program, students may select classes in Ballet, Jazz, Modern, Modern Jazz, **Floor Barre**, Tap, Theater Dance, Tango, Flamenco, Ballroom, Hip-Hop, Irish Step Dance, and Dance Exercise. Workshops in voice and audition techniques, as well as master classes with guest instructors, are offered throughout the year.³⁶

In a related category, applicants have also argued strenuously that some of these LEXIS/NEXIS stories and webpages taken from various Internet searches involve accredited students of Ms. Rommett who are now certified instructors, teaching the methods she has developed, and performing such services under outstanding licensing arrangements with applicants. In their responses to Office actions, applicants have identified a number of these

³⁴ Dance Magazine, November 1998 [#8 of Forty-six LEXIS/NEXIS stories (April 14, 1999)] [NB to self: success of warning letter!]

³⁵ The Boston Globe, January 16, 1998 [#4 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

³⁶ <http://www.dancenewyork.org/Schools/schools.html>

approved uses. Moreover, in recent years, Ms. Rommett has been emphasizing such training and quality control measures³⁷:

Contra Costa Ballet. July 3-August 12.
Pointe, Variations, **Floor Barre**, Stretch,
Character, Repertoire. Ages: 12-19.
Tuition: \$625. Rom. And bd: \$900. Apply
by April 15...³⁸

Broadway Dance Center offers a very diverse range of styles within all disciplines - Ballet, Jazz, Tap, Modern, and Theater dance. They also have **Floor Barre**, Yoga, Stretch, Tumbling, and African classes. They welcome all levels, basic through advanced.³⁹

Beth Abrams' Dance Classes: **Floor Barre** / Jazz Dance Classes for Adults and Teens
The **Floor Barre** / Jazz Dance classes combine a one-and-a half hour floor barre class with a hone hour jazz dance class. Both classes can be taken as a unit for the best dance deal in town. **Floor barre** may be taken separately fro those wishing a shorter class. Jazz dance students much attend the **floor barre** class.

The **Floor Barre** draws from ballet, modern, yoga, Feldenkrais, and Pilates and provides a lengthening, stretch-y and vigorous warm-up with a strong emphasis on breathe and alignment and is suitable for both beginning and experienced dancers, as well as injury recovery, pregnancy and older dancers...⁴⁰

³⁷ "Zena Rommett Floor-Barre Technique CERTIFICATION: *The Art of Teaching* - Application Form," Exhibit 2 attached to March 2, 1999 response.

³⁸ *Dance Magazine*, January 1995 [#20 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

³⁹ <http://www.dancenewyork.org/Schools/schools.html>

⁴⁰ <http://www.jps.net/grupo/New%20Pages/class.html>

CLASSIC CLASSES 3: ... Learn the famous Finis
[Jhung] **Floor Barre** ...⁴¹

Fury Gold ... received her ballet training
under many of the great master teachers
including ... Finis Jhung ... Ms. Gold is
currently the only person in the area
incorporating the principles of the ballet
floor barre into her classes.⁴²

STEPS On Broadway:

Ballet, modern, jazz, theater dance, tap,
modern jazz, **floor barre**, hip-hop, flamenco,
Irish step dance, tango, swing, dance
exercise, pointe, voice, workshops and
master classes ...

Broadway Dance Center:

Jazz, ballet, tap, **floor barre**, modern,
theatre, yoga, stretch, voice, fitness ...⁴³

Applicants also point out that, even among those
usages where Zena Rommett's name does not appear in
conjunction with "Floor-Barre," it is often used in
quotation marks, with capital letters or phrased in a way
that demonstrates the users recognize this term as
something other than simply a generic designation⁴⁴:

... tap, tot tumbling, pre-ballet, classical
ballet, jazz, tap, and modern dance, to

⁴¹ www.manhattandanceproject.com/balletdynamics/fjvideos.html

⁴² [Http://www.thedancefactory.net/tchrbiogold.html](http://www.thedancefactory.net/tchrbiogold.html)

⁴³ <http://www.rja-ads.com/dancedirectory/> Interestingly, on a
website that touts itself as "the best listing of dance schools
on the Web," "STEPS On Broadway" (Ms. Rommett) and "Broadway
Dance Center" (Beth Abrams) are the only two schools having a
"floor barre" listing.

⁴⁴ Cf. *Plyboo America Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633
(TTAB 1999) [In determining placement on the continuum of
distinctiveness of marks, it is relevant that articles and
webpages often set off the involved term in quotation marks or by
capitalizing the first letter(s) of the term].

include fitness classes called "**Floor Barre**."⁴⁵

... black-and-white photos of lithe NYCB dancers performing the exercises, outlines an extensive stretching program that incorporates a "**floor barre**," which mimics ballet's barre exercises but is performed lying down...⁴⁶

Jamison tries to start her day with a chapter of the Bible and a "**floor barre**," or a series of dance exercises on the floor.⁴⁷

... Classes begin with a nice, slow warm-up focusing on "**floor barre**" barre exercises done while laying flat on the back, for low-impact stretches...⁴⁸

... workout begins with floor exercises - abdominal strengthening and warm-ups for legs and hips in a hybrid of ballet, "**floor barre**" and body sculpting. Then standing, the class does a series of knee bends, leg stretches, kicks, and finally a bit of choreography from ...⁴⁹

Spotlight: Professional Dancer Gives Students Her Own Twist on Body and Ballet

Karen Williamson was bound to become a ballerina ... Williamson's method focuses on exercises (she refers to them as **the floor barre**) that teach her students where their bones belong and how to achieve proper alignment. She also helps many professional dancers overcome injuries. ... Williamson is now teaching two levels of ballet, as well

⁴⁵ Sarasota Herald-Tribune, August 3, 1998 [#2 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

⁴⁶ Chicago Tribune, May 25, 1997 [#11 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

⁴⁷ The Seattle Times, February 7, 1999 [#1 of Forty-six LEXIS/NEXIS stories (April 14, 1999)]

⁴⁸ San Antonio Express News, January 24, 1999 [#3 of Forty-six LEXIS/NEXIS stories (April 14, 1999)]

⁴⁹ The Chronicle of Higher Education, October 29, 1999 [#3 of Thirty-five LEXIS/NEXIS stories (~February 24, 2000)]

as modern dance, jazz and dance history. She also has plans for writing a book on **the floor barre**.⁵⁰

Floor Barre - A series of stretches and exercises designed for flexibility and strength. **Floor Barre** is a must for the serious dancer.⁵¹

Applicants also point out that some of the LEXIS/NEXIS stories and webpages demonstrate that, contrary to the position of the Trademark Examining Attorney, "Floor-Barre" is not synonymous with floor exercises associated with ballet inasmuch as it is grouped with other floor exercises for dancers, such as "Pilates":

... Meanwhile, I was getting physical therapy, swimming, doing Pilates and **floor barre** ...⁵²

Moore also speaks highly of a system called **Floor Barre**. "It's a system that, again, is on your back, so you don't have the pulls of gravity that can cause you to pull, twist, or ...

... All I can suggest is: do that, but couple it with a maintenance system - like Pilates, **Floor Barre**, Feldenkrais or White Cloud. All muscular systems" - which Moore points out ...⁵³

Velocity Dance Center: Strictly Seattle --
A Summer Dance Intensive
MAT/**FLOOR BARRE** with CARY REGAN ... This class combines her 17 years of teaching the

⁵⁰ <http://www.csufresno.edu/univrelations/feature/spotlight/ballet.html>

⁵¹ <http://www.thedancefactory.net/curclmfp.html>

⁵² *Dance Magazine*, May 1996 [#16 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

⁵³ *Back Stage*, March 19, 1993 [#23 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

Pilates Method with her experience as a trained dancer...⁵⁴

All forms of yoga, Pilates, stretching classes, **floor-barre** classes, stretching exercises on an exercise mat in your home.⁵⁵

ballet tech™

Claudia Rudolf Barrett, Director (Ballet technique, pointe, variations, repertoire, kniaseff **floor barre**)...

Jacqui Haas (**Floor barre** based on the historical concepts of J.H. Pilates - summer seminars)...⁵⁶

Beck Center for the Arts: Dance Classes:

FLOOR BARRE: ... Class will include stretch, relaxation and strengthening with the influence of Pilates and Qi Gong.⁵⁷

Of course, we should hasten to point out that on the other side of the argument put forward by applicants, it is clear that several of these latter excerpts appear to include "Pilates" itself as a specie of "floor barre" - not as an alternative form of floor exercises. By analogy, within the field of floor movements for dancers, it could be argued from the evidence placed into this record that several surnames (e.g., Feldenkrais, Pilates and Kniaseff) of recognized pioneers in this field (e.g., Dr. Moshé Feldenkrais, Joseph H. Pilates, and J.F. Boris Kniaseff) have undeniably retained their strength as source-

⁵⁴ <http://members.aol.com/veloacds/index.html>

⁵⁵ *Heart & Soul*, December 31, 1997 [#6 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

⁵⁶ <http://home.fuse.net/ballettech/staff.htm>

⁵⁷ [Http://www.beckcenter.org/dance/htm](http://www.beckcenter.org/dance/htm)

indicators (as does Rommett of Ms. Zena Rommett). These surnames, clearly functioning as strong source indicators, would have to be contrasted with the lack of source-indicating potential for the more widely used descriptors of ballet exercises that usually follow these very surnames.

Addressing the first part of the Ginn genericness inquiry based upon the evidence reviewed above, we find that the genus of services at issue in this case is ballet classes where the training exercises are executed on the floor. We base this finding on the fact that applicants recite their services this way in the application, i.e., "Educational services, namely, instruction in the ballet field." Applicants' specimens, brochures and literature likewise refer to applicants' services in terms of "floor exercises." See H. Marvin Ginn Corp., *supra*, wherein the court, in identifying the genus of goods at issue, looked to the identification of goods in the registration and to the fact that others offered similar goods.⁵⁸

⁵⁸ "Here, Ginn's registration is of the title of 'a magazine directed to the field of fire fighting.' In addition to Ginn's publication, the record shows that there are a number of other publications directed to that field. The class of magazines at issue is, therefore, those directed to the field of fire fighting."

H. Marvin Ginn Corp., *supra*, 228 USPQ at 532.

We turn next to the second part of the Ginn genericness inquiry: whether the matter applicants seek to register, FLOOR-BARRE, is understood by the relevant public primarily to refer to the genus of services at issue, i.e., ballet classes where the training exercises are executed on the floor.

Applicants argue that there are other names available to describe ballet classes where the training exercises are executed on the floor"

No one who wishes to teach a class involving floor exercises for dancers must use the words "Floor-Barre" to describe the class. The terms "Barre à terre",⁵⁹ "Floor Exercises", "Barre on the Floor", and "Horizontal Barre" are all available and used to describe other classes.⁶⁰

In addition to these theoretical possibilities, we also saw above the French expression "barre au sol" for similar floor-level ballet techniques.

On the other hand, we note that with applicants' October 1999 suggestion of alternative terms, the only citation to actual usage of any of these terms ("Barre à terre") was a single Internet citation to a "sample" schedule for a Bachelor of Fine Arts (B.F.A.) student at The Ailey School / Fordham University dance school. By

⁵⁹ <http://www.fordham.edu/BFA/samplesched.html>

⁶⁰ Response of October 14, 1999, p. 7.

contrast, the Trademark Examining Attorney found dozens of examples where the term "floor barre" appears to be used synonymously with floor exercises for dancers.

This record contains many instances where the term "floor barre" appears to be used generically. Applicants portray these examples as misuses of their service mark which problem they are attempting to deal with through educational efforts and a stepped-up certification program. Moreover, Ms. Rommett declares that she continues to issue cease-and-desist letters to competing organizations that use this term without indicating that it is a trademark of Zena Rommett. Nonetheless, it is true, as the Trademark Examining Attorney alleges, that writers in publications⁶¹ as well as dance schools in their catalogues (and other publicity releases)⁶² have often used the term "floor barre" in a seemingly generic manner:

In Part I of the series on alternative therapies (November), we described a traditional ***floor barre***. Part II (December) described an untraditional form of floor

⁶¹ In fairness to applicants, of the forty-eight LEXIS/NEXIS stories located by the Trademark Examining Attorney that were taken from newspapers and other publications, as seen from our review above, only about a dozen cannot be dismissed as irrelevant hits, uses involving applicants, Ms. Rommett's accredited students or known infringers, references having Plyboo-type set-offs, etc.

⁶² This general category of uses, as shown from the Trademark Examining Attorney's various Internet searches, reflects the largest single type of uses of the term "floor barre" in a seemingly generic fashion.

barre. Part III describes weight lifting as a rehabilitative therapy and a valuable enhancement to any dance program.⁶³

Melissa Bartusch, 13, performs floor exercises, or **floor barre**, at the BalletMet Dance Academy on Mount Vernon Avenue...⁶⁴

Newcomb College Campus: Newcom Dance Program, CLASS SCHEDULE: Stretch/yoga-**floor barre** - Nina Sandot, instructor; 8 - 9:15 AM; includes pre-class warm-up, basic ballet principles incorporated into floor barre (all levels), \$50.⁶⁵

... and follows with a **floor barre**, which helps strengthen the torso while further developing the abdominal area.⁶⁶

... Preballet, ballet, pointe, *pas de deux*, variations, **floor barre**, character, jazz, dance history, kinesiology, repertoire taught in part by a former *prima ballerina* of the Bolshoi ...⁶⁷

... abdominals ("The strongest dancer is one whose dance is most rooted in the stomach." Emily Coates asserts. "Movement radiates from the center."), **floor barre**, ballet center, and legs...⁶⁸

...Santa Cruz Ballet '97. June-Aug. The Studio. Ballet, Spanish, Jazz, **Floor Barre**,

⁶³ Dance Magazine, January 1998 [#5 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998) and <http://www.britannica.com/bcom/magazine/article/print/0,5746,39755,00.html>]

⁶⁴ The Columbus Dispatch, July 4, 1997 [#9 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

⁶⁵ The Times Picayune, June 11, 1997 [#10 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

⁶⁶ Newsday, March 31, 1997 [#12 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

⁶⁷ The Cincinnati Enquirer, March 23, 1997 [#13 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

⁶⁸ The Village Voice, January 28, 1997 [#14 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

Stretch. Level I-V. Min. age: 8. Contact Jean Dunphy...

... Summer programs. June-Aug. Young People's Program, Workshop Series, Scholarship Programs. Ballet, Modern, Jazz, Tap, **Floor Barre**, Hip-hop, Flamenco. Contact: ...⁶⁹

Designed to help adults rejuvenate their bodies, the class includes toning exercises, **floor barre**, and barre and center work.⁷⁰

The Aug. 5 class will be preceded by a **floor barre** technique class by Vivian Reed and followed by a panel discussion and picnic...⁷¹

"... It was more work than I thought. We did **floor barre** and things that strengthen and stretch the body; for a male it was really complicated."⁷²

We have a pre-professional level that trains for two hours per day minimum with point[e], variations, and **floor barre** six days a week ...⁷³

... Talks included how to prevent injuries and staging a performance. Participants also took **floor barre** and ballet technique classes ...⁷⁴

⁶⁹ Dance Magazine, January 1997 [#15 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]. In a March 1999 declaration, Ms. Rommett did note that during August 1997 she advised Dance Magazine orally that "'Floor-Barre' was a trademark of Zena Rommett and should not be used in a generic manner."

⁷⁰ The Plain Dealer, October 2, 1995 [#17 and #18 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

⁷¹ The Atlanta Journal and Constitution, July 27, 1998 [#19 of Thirty-eight LEXIS/NEXIS stories (September 24, 1998)]

⁷² The Village Voice, December 8, 1998 [#4 of Forty-six LEXIS/NEXIS stories (April 14, 1999)]. Applicants notes correctly that in cases where the excerpt contains a direct quotation, it is difficult to know exactly how the speaker indented to communicate the usage of the term "Floor-Barre."

⁷³ Ventura County Star, December 5, 1998 [#5 of Forty-six LEXIS/NEXIS stories (April 14, 1999)]

⁷⁴ Fort Lauderdale Sun Sentinel, November 22, 1998 [#6 of Forty-six LEXIS/NEXIS stories (April 14, 1999)]

Anne-Rene Lawton, a 33-year-old yoga and **floor barre** student helping with the move, is just relieved the Dance Space didn't have to shut its doors permanently.⁷⁵

School of Cincinnati Ballet, Summer 1999
Program ... some of the classes/workshops that will be offered during the summer program: Ballet, Modern, Jazz, African, pointe, variations, partnering, **floor barre**, theraband strengthening, choreography, dance history, rhythm & music, and stage make-up ...⁷⁶

Rhythm & Motion Dance Center: Stretch & Strength - In this class ... [w]e start with a moving and dancing warm-up ... and through yoga and **floor barre** inspired work, dynamically open up and strengthen the body ...⁷⁷

An introduction to ballet technique and creative exploration through ballet movements. Class combines a **floor barre** to begin isolating and strengthening specific muscle groups ...⁷⁸

FLOOR BARRE/MODERN CLASSES. Orts Company dancer and NYC refugee Lucia Zeffirelli teaches on-going classes combining the [J. Parker] Copley technique with Graham, Ballet and [José] Limón foundations. Classes meet from 5:30 to 7 p.m. Tuesday at the Orts space, 930 N. Stone Ave. Price is \$6 per class, or \$20 for five classes. Call 882-0195 for information.⁷⁹

Duke University Dance Program, Fall Semester 1999: ... Dance 63(510788) Intermed. Modern Dance II ... Increased complexity of movement

⁷⁵ The New York Daily News, July 29, 1999 [#4 of Thirty-five LEXIS/NEXIS stories (~February 24, 2000)]

⁷⁶ <http://www.cincinnati-ballet.com/school.htm>

⁷⁷ <http://www.rhythm-and-motion.com/stretch.html>

⁷⁸ <http://www.ci.walnut-creek.ca.us/caeyouthspring99.htm>

⁷⁹ <http://www.weeklywire.com/tw/03-23-95/citylist.htm#dance>

sequences and greater emphasis on clarity of expression and quality of performance. Prerequisite: Dance 61 or equivalent. One session per week will be a **floor barre**, which focuses on increasing strength, flexibility, and efficiency of movement, and improving alignment.⁸⁰

City of Foster City, California - Parks and Recreation

Ballet: Dance to your favorite ballet music like the Nutcracker and other great ballets. This class will introduce young dancers to **floor barre**, barre exercise and center combinations...⁸¹

Welcome to ballet tech™

... There are full day workshops in the summer which also include classes in *pas de deux*, kinesiology, **floor barre**, character dance and dance history...⁸²

Movement Classes at Groundwerx Movement Center

Intermediate Contemporary Dance: This eclectic modern-based dance class focuses on an enjoyable, sane, anatomically sound approach to movement. Class begins with **floor barre** and conditioning exercises ...⁸³

Danville Ballet Company - Spring Session

2000: ... Our expanded Class Schedule includes: ... -- **floor barre** ...⁸⁴

University of Rochester: Dance: Courses of Instruction:

275. Contemporary Dance Technique. Credit - 2 hours. This class ... begins with a ballet **floor barre** and draws on the complementary strengths of ballet and modern dance traditions. A strong emphasis is

⁸⁰ <http://www.duke.edu/web/dance/fall99.html>
⁸¹ http://www.fostercity.org/parks/leisure_update/youthdance.htm
⁸² <http://home.fuse.net/ballettech/home.htm>
⁸³ <Http://www.as220.org/groundwerx/gmc/class.html>
⁸⁴ <Http://www.danvilleballet.org/>

placed on developing musicality in movement.⁸⁵

Shawl-Anderson Dance Center: Floor Barre/Stretch Class⁸⁶

Academy of Performing Arts: *San Diego County's Leading Studio*

APA Classes: ... **FLOOR BARRE** - Friday, 9 - 10:30 am Cherylk Borrego⁸⁷

Joy Of Motion Dance Center

Mané Rebelo-Plaut

Ballet, Stretch & Align, **Floor Barre⁸⁸**

Dartmouth College: Hopkins Center

1999-2000 Class Schedule and Descriptions

BALLET FUNDAMENTALS: ... Each class has three sections: **floor barre**, barre and center floor. The **floor barre** prepares the body for dancing through exercises that develop strength, flexibility and proper alignment.⁸⁹

San Antonio Dance Academy

Jazz II

Level: Intermediate (at least one year of Jazz)

Ages: generally nine to eleven.

A one-hour class using barre, **floor barre** and centre exercises set to popular music. Work is on technique, rhythm, coordination, flexibility, turns, jumps and learning choreography...⁹⁰

In order to overcome this type of evidence placed into the record by the Trademark Examining Attorney, applicants have submitted the affidavits of accomplished dancers who

⁸⁵ <http://www.rochester.edu/Bulletin/CAS/Courses/dance.html>

⁸⁶ <http://www.shawl-anderson.org/alignment.html>

⁸⁷ <http://www.apastudios.com/classes.htm>

⁸⁸ <http://www.joyofmotion.org/faculty/mane.html>

⁸⁹ http://www.dartmouth.edu/~hop/Pages/Dance/class_schedule_fall99.html

⁹⁰ <http://www.webgalleries.com/sada/jazz2.html>

have danced for many years (and many of whom have taught dance) who affirm their long familiarity with the term "Floor-Barre," each alleging her recognition of the term "... to identify and distinguish a specific type of ballet exercise developed by Zena Rommett" Their names, along with the number of years each has been dancing and has been familiar with the term "Floor-Barre" are shown below:

Affiant	Dancing	Knew of "Floor-Barre"
Carol Abizaid	> 15 years	Since 1986
Barbara Cutney, Ph.D.	12 years	Many years
Lyn Wiltshire-Beer Elam	23 years	Many years
Lorry May	> 30 years	Many years
Shelly Power	> 30 years	Many years
Laurie Rabinova	>30 years	21 years
Clara Stegeman	45 years	25 years
Debra Zalkind	> 25 years	25 years

Applicants also argue that it is relevant that neither the classified telephone directory submitted by applicants nor a listing of barre exercises contains an entry for "floor-barre."⁹¹ On the other hand, we note that this latter listing also does not contain any of the

⁹¹ This provides yet another interesting example of where applicants and the Trademark Examining Attorney both cite to different parts of the same source (here the <http://www.pav.org/> website) to prove their respective points. Here, the applicants cite to <http://www.pav.org/barcont.htm> to show that "floor barre" is not listed among the 200 exercises included in "The Barre Section," while the Trademark Examining Attorney uses <http://www.pav.org/lines/SFDC.html> to show class listing at the San Francisco Dance Center LINES Ballet for floor barre.

alternative, generic designations applicants suggested above⁹² for floor exercises for dancers.

In answering the second prong of the Marvin Ginn genericness inquiry as to how FLOOR-BARRE is understood by the relevant public, this record reveals a decidedly mixed bag. Based on this record, we have serious doubts on the issue of genericness. Under our case law, we must resolve these doubts in favor of applicants. Accordingly, we are compelled to reverse the refusal to register made by the Trademark Examining Attorney. It certainly goes without saying that any person or group of persons who can demonstrate a legitimate interest in the use of FLOOR-BARRE may file an opposition to this application. *Cf. In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1144 (Fed. Cir. 1987).

Applicant has argued, should we find this matter not to be generic, that pursuant to Section 2(f) of the Trademark Act, we should find that the designation FLOOR-BARRE has acquired distinctiveness as a source indicator in light of Ms. Rommett's prominent use of this term for more than forty years.

⁹² See pp. 20 - 21 *supra*.

The Trademark Examining Attorney failed to address applicants' showing of acquired distinctiveness on its merits. That is, having taken the position that any evidence of acquired distinctiveness is irrelevant for a generic term, the Trademark Examining Attorney has done nothing, in the alternative, to refute this particular showing. While acknowledging that many dance schools without any apparent connections to applicants do appear to use this term to describe their floor exercises for dancers, we conclude that applicants have proven acquired distinctiveness by a preponderance of the evidence. See Tone Brothers, Inc. v. Sysco Corp., 28 F.3d 1192, 31 USPQ2d 1321 (Fed. Cir. 1994) [the party attempting to establish legal protection for its mark has the burden of proving acquired distinctiveness by a preponderance of the evidence]. Hence, we find that this application should proceed to publication for opposition in the Trademark Official Gazette under the provisions of Section 2(f) of the Trademark Act.

Decision: The refusal to register this matter as generic under Section 2(e)(1) of the Act is hereby reversed.